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No. 02-355

IN THE

Supreme Court of the United States

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC.,
Petitioner,

v.

PETER VEECK D/B/A REGIONAL WEB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending free enterprise in medicine. Founded in 1943, AAPS has thousands of physician members in all specialties and is one

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

of the largest national physician organizations funded nearly entirely by membership. Its motto is "omnia pro aegroto," which means "all for the patient." Members of AAPS, like most physicians, must comply with the legally mandated Current Procedural Terminology ("CPT") medical codes, which are developed and controlled by the American Medical Association ("AMA"). The AMA attempts to prevent others from electronically posting and criticizing the CPT medical codes that physicians must use when billing for services under Medicare and other government programs, because the AMA asserts a copyright on the codes. This frustrates access to the CPT codes and meaningful debate about them. In the case of the CPT billing requirements, a restatement of its absurd complexities and ambiguities, replete with criminal sanctions for violations, would itself constitute a powerful criticism of the government requirements. AAPS objects to restrictions on access to and debate over the CPT which are sought by the AMA, and the distorting effect that has on the practice of medicine. AAPS opposes the Petition in order to ensure that AAPS members and others have unrestricted access to legal requirements.

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. It is dedicated in part to promoting greater public access to and scrutiny of laws and governmental records, including information relating to medicine, education and government-funded research. EFELDF objects to censorship of public debate about legal requirements, and opposes the Petition so that the public may have full access to legal requirements.

Amici have a direct and vital interest in the issues presented to this Court with respect to restrictions on access to laws, regulations and governmental records.

SUMMARY OF ARGUMENT

The decision below is entirely consistent with the other Circuits, and is compelled by controlling Supreme Court precedents. *Veeck v. Southern Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*). There is no conflict here that could justify a writ of certiorari. The judgment below comports with the First and Ninth Circuits, and the Second Circuit has yet to address the issue of model codes. Indeed, every decision addressing private assertion of ownership of the law has reached the same conclusion as the Fifth Circuit: no one can own the law and prevent its publication by others. This Court, in *Banks v. Manchester*, established as much over one hundred years ago, and the Fifth Circuit properly applied it below. 128 U.S. 244 (1888). A real conflict has not arisen on the questions presented.

Petitioner Southern Building Code Congress International, Inc. ("SBCCI") misreads the decision below in arguing that it is born out of "due process." It is not. The Fifth Circuit *en banc* eschewed any reliance on due process. The second of Petitioner's Questions Presented posits a factual inquiry of reasonableness of its terms of access, but that has no bearing on the threshold issue of whether it can restrict access at all. Petition for a Writ of Certiorari ("Pet.") at (i). A private power to restrict and exclude access to the law cannot be justified based on SBCCI's claim that it will not fully exercise such power.

Petitioner's other question for review is likewise inadequate. It implies that "organizations that create copyrighted model codes and standards [should not be] divested of their rights" by imposition of their codes by law. *Id.* But the court below did not divest SBCCI of any cognizable "rights". There are no legitimate rights in controlling access to law and censoring others who, like Respondent Veeck, exercise free speech in publicizing it. Moreover, SBCCI admits in its Petition that it "encourages

governments to *adopt* its codes." *Id.* at 14 (emphasis in original). Lobbyists cannot urge passage of laws and then also insist on controlling publication of those same laws for financial gain.

Petitioner seeks an entitlement for what it calls "financial rights," and predicts disaster if standards-setting organizations cannot stop others from publicizing the law. *Id.* at 23, 27. There is nothing in the record to support this forecast of implausible doom, and it is unripe for review now by this Court. SBCCI and similar organizations affirmatively lobby government to endow their codes with force of law for their benefit, and they can hardly complain that their windfall may not be as great as they like. At best, they are officious lobbyists, with no greater claim to an entitlement than an officious intermeddler has under contract law—which is nil. SBCCI's claim that it suffered an involuntary transfer of copyright in the codes is unsupported by the facts.

ARGUMENT

No court has held that a private entity may own the law. The Petition does not, and cannot, cite any meaningful conflict in support of certiorari. While the rationales among the Circuits have slightly varied, their outcomes have been the same: no claim of private ownership of the law can suppress restatement of it by another. The Petition should be denied.

Petitioner errs in arguing that the Copyright Act somehow entitles SBCCI to censor Respondent Veeck's restatement of the law. The Act does not allow a private organization like SBCCI to impose restrictions on access and publication of the law. Veeck, like all citizens, enjoys the free speech right to restate the law, and the Fifth Circuit *en banc* construed and applied the Act correctly.

Nor did the Fifth Circuit "cavalierly" dismiss Petitioner's claim to "financial rights," which constitutes little more than corporate welfare for lobbyists. Of course SBCCI and numerous *amici* want this Court "to protect the financial interest of" their businesses by "maintaining the revenue stream necessary to support their activities." Pet. at 27. But that argument is baseless. There are no facts to support SBCCI's claim that its monopoly rents are "necessary" or efficient, and both economic and policy considerations militate against private ownership and control of the law.

I. THE DECISION BELOW IS CONSISTENT WITH OTHER CIRCUITS AND THIS COURT.

The Fifth Circuit *en banc* surveyed the other Circuits and held in harmony with them. Its ruling is virtually identical to that of the First Circuit on similar facts. The Ninth Circuit, for its part, rendered an identical judgment in an analogous case, albeit with divergent dictum. The Second Circuit has yet to address comparable facts. Moreover, the Fifth Circuit dutifully applied the controlling precedents of this Court.

The case closest to the one at bar arose in the First Circuit. *Building Officials and Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ("*BOCA*"). There the court vacated a preliminary injunction preventing the defendant from distributing copies of a building code analogous to the codes at issue here. "The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." *Id.* at 734. Likewise, the court below held that no one can own the law.

The next closest case arose in the Ninth Circuit, which held that the American Medical Association (AMA) cannot interfere with third-party publication of its coding system for medical procedures. *Practice Management Info. Corp. v.*

American Medical Ass'n, 121 F.3d 516 (9th Cir.), *cert. denied*, 522 U.S. 933 (1997), *modified*, 133 F.3d 1140 (9th Cir. 1998). There, as here, the code developer (the AMA) induced government to require its codes, and then sought to restrict publication by others. There, as here, the court ruled against the putative owner of the law, declaring that "the AMA misused its copyright" by inducing the government to mandate it exclusively. 121 F.3d at 520. Accordingly, the copyright was unenforceable against a rival publisher seeking to sell the mandated codes. *Id.* at 521. This result was thus identical to the outcome in this case: the developer of government-mandated codes cannot prevent their publication by others.

Against these consistent judgments, Petitioner nevertheless attempts to gin up a conflict. SBCCI largely ignores the *BOCA* decision, and attempts to distinguish the Ninth Circuit decision by declaring that "incorporation into law did not extinguish the AMA's copyright." Pet. at 11. But the Ninth Circuit did hold such copyright to be unenforceable, the essential point here. Its judgment was against the AMA, and the judges' discussion of copyright in the abstract was dicta. The unenforceable copyright established in *Practice Management* provides no meaningful support for the Petition here.

Petitioner ultimately relies on a Second Circuit decision, which did not concern legally mandated codes. *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995). There the court upheld copyright enforceability for a price list used as a permissible minimum for insurance reimbursement, known as the "Red Book." A statutory reference to an allowed floor for private insurance payments is a far cry from the comprehensive mandate for the codes here. "This case does not involve references to extrinsic standards. Instead, it concerns the wholesale adoption of a model code promoted

by its author, SBCCI, precisely for use as legislation." 293 F.3d at 804. The *CCC* court treated the price list, which has a market independent of government regulation, like an assigned book in a school curriculum, neither of which is predominantly governmental like building safety codes. 44 F.3d at 74. Also, the full compulsion of law is lacking for school books and price lists, in contrast to the building safety codes at issue here.[2]

All of these Circuit decisions adhere to the basic teaching of *Banks v. Manchester*, 128 U.S. 244 (1888), as did the Fifth Circuit *en banc*. "[T]he authentic exposition and interpretation of the law, [] binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute." *Id.* at 253. That was a faithful extension of *Wheaton v. Peters*, which established that "no reporter has or can have any copyright in the written opinions delivered by this court; . . . the judges thereof cannot confer on any reporter any such right." 33 U.S. 591, 668 (1834). The court below correctly held that "we read *Banks*, *Wheaton*, and related cases consistently to enunciate the principle that 'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law." 293 F.3d at 800. There is no conflict justifying certiorari here.

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[2] Petitioner also relies on *County of Suffolk v. First Am. Real Estate Sol'ns*, 261 F.3d 179 (2d Cir. 2001). That decision is inapposite because the tax maps at issue "do not create the legal obligation," in contrast to the codes here. 261 F.3d at 195.

II. THE FIFTH CIRCUIT *EN BANC* PROPERLY APPLIED THE COPYRIGHT ACT, AND ITS JUDGMENT COMPORTS WITH FREE SPEECH.

"Imagine how different things would be," observes a commentator cited by Petitioner, "if James Madison could collect royalties from all those who would reprint his august constitutional words." Robert Kry, Case Note, *The Copyright Law*, 111 Yale L.J. 761 (2001). This vision is already being pursued by some who claim to have created phrases used in statutes. The Constitution can only be expressed in one way, and no copyright can exist on those words. Likewise, "[t]he building codes of Anna and Savoy, Texas can be expressed in only one way; they are facts. Respondent Veeck placed those facts on his website in precisely the form in which they were adopted by the municipalities." 293 F.3d at 802. The court below properly applied the Copyright Act, and its ruling comports with free speech.

A. The Petition Fails to Identify any Misconstruction of the Copyright Act.

The Petition declares that "[f]rom the earliest days of the Republic, Congress has protected the rights of copyright holders." Pet. at 12. But neither Congress nor the courts have embraced private ownership or control of the law.

Petitioner appeals to the statutory prohibition against involuntary transfer. Pet. Br. at 13-14 (quoting 17 U.S.C. § 201(e)). But as the Fifth Circuit *en banc* observed, there is nothing "involuntary" about how "SBCCI urged localities to adopt its model codes." 293 F.3d at 803. SBCCI admits in its Petition that it lobbied for adoption of its codes that, unlike the "Red Book" in *CCC Info. Servs.*, would be virtually worthless in the absence of the legal mandates. Pet. Br. at 14; 44 F.3d at 63-64. Accordingly, the Fifth Circuit was entirely correct in finding that "[t]he issue in the case is not the

voluntariness of the appropriation but the legal consequences flowing from the permission that SBCCI gave." 293 F.3d at 803. Like the officious intermeddler in contract law, SBCCI cannot claim entitlement from its lobbying. *See, e.g.*, Restatement of Restitution § 2 (1937) ("A person who officiously confers a benefit upon another is not entitled to restitution therefor.").

Petitioner next relies on language in federal statutes and regulations encouraging agencies to be solicitous of copyrights when using or publishing private work. Pet. 14-16. These salutary guidelines, however, have no bearing on republication of actual laws. The Copyright Act expressly denies any copyrights for federal statutes and laws, and this prohibition presumably applies to states also. "[S]tate statutes, no less than federal statutes, are regarded as being in the public domain." 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §5.06[c] at 5-92 (2000). The court below noted that "Justice Harlan, riding circuit, denied an injunction sought for the compiler of Michigan statutes, holding that 'no one can obtain the exclusive right to publish the laws of the state in a book prepared by him.'" 293 F.3d at 796 n.4 (quoting *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898)).

Petitioner then criticizes a due process right to access the codes, without realizing that the court below never created or relied on a due process right. The court below emphasized that:

> *Banks* does not use the term 'due process.' There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to

> influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is 'free for publication to all' is to expand, not factually limit, the extent of its availability.

293 F.3d at 799.

Petitioner ultimately relies on its asserted generosity in making "a copy of the materials accessible on a reasonable basis." Pet. at 19. Such beneficence could end immediately, of course, were this Court to rule for SBCCI. Petitioner posits that a defense of "fair use" would protect violation of the copyright in those circumstances, though only for those who reproduced the codes for personal use. *Id.* at 21.

These "safety valves," as Petitioner puts it, are plainly inadequate. SBCCI and similar organizations have every incentive to restrict access and increase costs once they successfully lobby governments to mandate their codes. By censoring publication on the internet, SBCCI and others can effectively thwart access even for personal use. Moreover, SBCCI's approach does nothing to respect the free speech right of Veeck and other citizens to restate the law and encourage public scrutiny of it. "The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. **We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect."** *Lee v. Runge*, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting from denial of certiorari) (citation omitted, emphasis added).

Petitioner's allusion to school textbooks and the Bluebook are inapposite because they are not promulgated as laws, as were the codes at issue here. The Fifth Circuit *en banc* put it best:

> We emphasize that in continuing to write and publish model building codes, SBCCI is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent 'the law' of the governmental entities and may be reproduced or distributed as 'the law' of those jurisdictions.

293 F.3d at 802. The law can only be expressed accurately in one way: the way it is written. Veeck merely published those facts constituting the law.

B. Respondent Veeck Has a Free Speech Right to Post the Law.

All citizens, including Respondent Veeck, have a fundamental free speech right to restate the law. "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring). The law itself is central to "public affairs" and the operation of government. "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

Legal requirements, like the codes at issue here, constitute government speech which all have a right to hear. Freedom to receive information is a First Amendment right, which requires vigilance to protect. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive . . . ."). This remains true regardless of who developed the building codes here. "Government by secrecy is no less destructive of democracy if it is carried on within

agencies or within private organizations serving agencies." *Forsham v. Harris*, 445 U.S. 169, 190 (1980) (Brennan, J., dissenting). The public's interest includes "anything which might touch on an official's fitness for office." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). The building codes are directly related to government policy, and are even the product of government decisions for which public officials must be accountable. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("a major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs") (quotations omitted); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (noting the preparation of "the people for an intelligent exercise of their rights as citizens").

A goal of the First Amendment is to promote "an informed and educated public opinion with respect to a matter which is of public concern." *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). Inherent in this goal is an informed public about the laws themselves. The First Amendment guarantees "unconditional freedom to criticize the way such public functions are performed," and the public cannot effectively criticize what it cannot efficiently access. *Rosenblatt*, 383 U.S. at 94 (Black, J., concurring in part and dissenting in part).

For building safety codes, the adverse effect of restrictions on access is particularly egregious. There is a compelling state interest in maximizing public compliance with building safety code requirements. Lives are saved through public reporting and subsequent correction of building safety violations. The more efficient the public access to these codes is, the greater the compliance will be. Public posting of those codes on the internet would inevitably result in alert citizens identifying safety violations and demanding their correction. Tragic loss of life in building fires could be minimized if the public were more informed about building safety codes and timely evacuation procedures. The need for

public access to Medicare coding procedures through the CPT, controlled by the AMA, is likewise compelling.

III. PETITIONER'S ARGUMENT FOR PROTECTION OF ITS "FINANCIAL RIGHTS" IS ENTIRELY SPECULATIVE AND UNRIPE, AND LACKS LEGAL OR ECONOMIC JUSTIFICATION.

The Petitioner lacks ripeness to allege future economic harm from the decision below. To date, there is no proven harm to SBCCI, and there may never be any. Even if harm were likely, this Court should not grant special protection for "financial rights" of SBCCI.

The entire second half of the Petition—Points II.A and II.B—fails to cite a single decision or meaningful evidence. It consists entirely of speculation unripe for review. The Supreme Court is obviously not the place to address such commercial forecasts. If any of Petitioner's speculation materializes, then only the lower courts could be the proper venues for addressing them in the first instance.

A. Petitioner's Speculation About Future Harm is Unripe for Review.

Petitioner's hyperbole lacks any evidentiary support in the record. For example, SBCCI insists that "[t]he Fifth Circuit's ruling would devastate the operations of drafters not only of model building codes, but those of myriad other standards-setting entities." Pet. at 23. Its factual basis? Petitioners merely cite the filing of *amicus* briefs by organizations who, naturally, oppose any risk of decline in their revenue. *Id.* Mere speculation does not ripen an issue for review by this Court. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (1992) (denying standing to "pure speculation").

There is simply no evidence for the claim of fiscal calamity by SBCCI. "SBCCI's factual 'evidence' on this point

consisted of self-serving affidavits from its officers and employees, and proof that it earns perhaps 40% of its revenue from sales of the domestic model codes and amendments. No effort was made to show by what amount copying by people like Veeck would or could reduce the organization's revenue." 293 F.3d at 805 n.21. The Petition does nothing to remedy this deficiency. SBCCI presents a factual issue without any factual basis.

Reflecting the enormously lucrative business of controlling legally mandated codes, SBCCI recently announced a merger with another coding group and with BOCA, the unsuccessful plaintiff in the *BOCA* decision discussed in Part I above.[3] They boast that "[m]ore than 97% of U.S. cities, counties and states that adopt model codes choose building and fire codes created by the three building safety groups that make up" the new entity.[4] The Petition apparently attempts to supplement this monopoly control of the codes with ownership of the law itself.

At best, SBCCI's unsubstantiated fears of revenue loss constitute legal posturing. But even if true, any future revenue decline may reflect improved market efficiency. A decline in SBCCI revenue may represent cost savings for governments, citizens and others. Such decline might also result from wider, low-cost dissemination of the safety codes, saving lives as a more educated public recognizes violations and hazards.

SBCCI surely dislikes the public scrutiny that will result from posting its codes on the internet for all to see and

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[3] "One United ICC by 2003: Learn Why BOCA, ICBO and SBCCI Decided to Integrate," *http://www.sbcci.org/News&Information/One_United ICC_by_2003.cfm* (viewed 10/03/02).

[4] "Building Safety Groups Vote to Approve ICC Consolidation," *http://www.sbcci.org/News&Information/consolidation_approved.cfm* (viewed 10/03/02).

critique. The attention may expose illogical code requirements, or unjustified preferences for certain suppliers. Citizens may complain to their representatives about defects in the codes. Volunteers may step forward to write a superior building code system, enhancing the competition for legal standards and decreasing SBCCI's market share. Regardless of how SBCCI will fare in all this, the quality of the law is likely to improve from this process. In any event, this issue is unripe for review now.

B. Petitioner Lacks Any Cognizable "Financial Rights" in the Law.

Petitioner SBCCI asks this Court to create a new entitlement for "financial rights" of trade organizations, which at best is a form of corporate welfare. This argument is merely a reformulated version of the "sweat of the brow" approach, which has been emphatically rejected by this Court. "Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles. Throughout history, copyright law has recognized a greater need to disseminate factual works than works of fiction or fantasy." *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (quotations omitted); *see generally id.* at 353-60. There is no greater need than to disseminate the law, regardless of the impact on the financial interests of a few groups like SBCCI.

Petitioner even concedes the success of West Publishing in publishing publicly available judicial opinions and statutes, without benefit of a copyright in the law. Pet. at 19. As the Fifth Circuit *en banc* observed, "to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with 'value-added' in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out." 293 F.3d at 806. Whether SBCCI makes as

much money after Veeck posts the codes remains to be seen, but this Court should not intercede to save it from the risk of revenue decline.

It is worth noting that the Petition declares that SBCCI's "membership includes 2,500 cities, counties, states and governmental agencies as well as 14,000 architects, engineers, building contractors, trade associations, and manufacturers." Pet. at 1. One would hope that government employees have valuable input into the development of the codes. Yet SBCCI, by clinging to its fiction of a copyright in the law, has a financial incentive to ignore federal employees' input lest it jeopardize SBCCI's claim to copyright. 17 U.S.C. §§ 105, 403. SBCCI claims government agencies as members, but its attempt to own the law requires it to reject federal input. This is hardly a practice worth encouraging.

C. There is No Economic Justification for Private Ownership of the Law.

Economic theory is entirely against Petitioner SBCCI in its quest for monopoly ownership of the law. "By a perpetual monopoly, all the other subjects of the state are taxed very absurdly in two different ways; first, by the high price of goods, which, in the case of a free trade, they could buy much cheaper; and secondly, by their total exclusion from a branch of business, which it might be both convenient and profitable for many of them to carry on." Adam Smith, *Wealth of Nations* 814 (Random House: 1994, Cannon ed.). The owner of the law, like any monopolist, can charge far more than the price dictated by the supply and demand curves of a free market.

The Fifth Circuit *en banc* rightly reversed the district court, which had mistakenly found that "the codes are offered to the local governments at no cost to the public." *Veeck v. Southern Bldg. Code Cong. Int'l, Inc.*, 49 F. Supp. 2d 885,

891 (E.D. Tex. 1999). To the contrary, SBCCI's monopoly imposes substantial costs on the public. The public cannot readily access the building safety codes over the internet, and must pay non-competitive, inflated charges imposed by virtue of the monopoly power of SBCCI. Even if most of the costs are borne by other businesses, a point emphasized by Petitioner, those costs are then merely passed onto the consuming public. Pet. at 27. The SBCCI monopoly depresses public awareness of the safety codes, such that reporting of violations is limited. The resultant harm is in lost lives as well as dollars.

Removing private restrictions on public access to these codes reduces distortions in their development. Currently, private organizations like SBCCI and the AMA can tailor their codes, with the force of law, for the benefit of their own financial interests and benefactors rather than the public. The legal safeguards that protect the public against corruption of political process, such as disclosure requirements and prohibitions on payments to decisionmakers, do not ordinarily apply to these private organizations as they manipulate the legal requirements. "[I]t is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them." 293 F.3d at 806 (quotations and footnote omitted).

The Nobel Prize-winning Coase Theorem also militates in favor of removal of this monopoly as a "transaction cost" that obstructs efficiency without furthering any social goals. *See, e.g.*, Ronald H. Coase, "The Problem of Social Cost," 3 *J. Law & Econ.* 1 (1960). Establishing that no one can own the law removes an inefficient transaction cost for accessing it. SBCCI, the AMA, and similar organizations would still be free to negotiate benefits for developing codes, but it is error

to mandate by fiat a windfall benefit for them. The Coase Theorem also throws cold water on Petitioner's speculation that the decision below will cause the sky to fall. In fact, the desired level of activity—here code development—is undeterred by shifting the entitlements, unless transaction costs increase dramatically. The highly successful development and implementation of the Uniform Commercial Code and International Classification of Diseases, without copying restrictions, so demonstrate.

Private ownership of the law causes distorting incentives to manipulate the law, in order to increase sales through revised versions. The medical CPT codes owned by the AMA are constantly changing in trivial ways, thereby providing a prodigious revenue stream to the AMA as it sells the revised versions. This is contrary to the public interest, which is to promote compliance rather than revenue to a monopolist. Ambiguities and perpetual changes, which are obstacles to maximizing public compliance, constitute a golden goose for the monopolist who can sell explanatory materials and seminars. Removal of this artificial monopoly would remove financial incentives to repeatedly change the codes, rather than stabilize them.

The AMA has even reneged on its promise to provide its government-mandated codes freely to the public. It promised to provide its CPT codes freely to the public over the internet in order to persuade the government to require use of its codes, but the AMA then ignored its promise with impunity. *See* Statement of the AMA to HHS Re: Physicians' Current Procedural Terminology (CPT), T. Reginald Harris, MD, April 16, 1997 ("The AMA has taken additional steps to make CPT available over the Internet and is expected to complete an agreement with the HCFA in the very near future. Under the agreement, complete public access to HCFA data files containing CPT will be available, free of charge, both domestically and internationally.") (testimony

was presented in April 1997, and yet the AMA continues to attempt to prevent anyone from posting CPT requirements on the internet) (available *at http://www.aapsonline.org/medicare/amacpt.htm*).

Without a state-conferred monopoly, Petitioner SBCCI and others could still negotiate directly with government and then sell their codes with a governmental "imprimatur" as an official developer of the codes. In that scenario, public access and compliance would inevitably increase, and transaction costs would decrease. Distribution would no longer be artificially suppressed by the monopoly, and SBCCI and its counterparts would have to earn their keep the old-fashioned way—through competition. Economically, that is exactly as it should be.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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